In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1564

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner, who is an attorney, was convicted of willfully failing to file income tax returns for the years 1965 through 1968, in violation of 26 U.S.C. 7203. The trial judge sentenced him to four years' imprisonment but provided, pursuant to 18 U.S.C. 3651, that petitioner be confined in a jail-type institution for four months with the execution of the remainder of the sentence to be suspended and petitioner placed on probation for the remainder of the four year period. Petitioner was also fined a total of $20,000. The court of appeals affirmed per curiam (Pet. App. 8-9).

Petitioner's only contention here is that he should have been permitted at trial to introduce evidence of marital and financial difficulties which he allegedly experienced during the four prosecution years, claiming that the proposed evidence would have been relevant to his "willfulness" in failing to file the returns.

1. At trial, petitioner testified that he had received substantial gross income during each of the prosecution years, that he had known that he was required to file tax returns for those years, that he had failed to file the required returns, and that the reason for his failure was that he had lacked funds to pay the taxes which his returns would have shown he owed (R. 35, 37-39; see, also, R. 12-13, 17-18.).[1] Petitioner had previously informed Internal Revenue Service agents that he knew he could have filed his returns without immediately paying the tax but that he had not done so because he wanted to avoid tax liens (R. 22-23).

Petitioner was also asked, on direct examination by his counsel, about certain financial transactions occurring prior to the prosecution years (R. 28). Upon objection by the government, petitioner's counsel asserted that he intended to develop testimony respecting "a series of financial difficulties and a series of marital difficulties" (R. 29). The trial judge asked how these difficulties were material, and petitioner's counsel replied only that the "financial pressures, pressures of creditors * * * reflect on the lack of any evil motive" (*ibid.*). The court then ruled (R. 33):

> * * * a lack of funds or an inability to pay does not constitute reasonable cause for failure to file declarations or estimates of tax returns. Therefore, any evidence relative to inablility to pay or lack of funds will be excluded.

2. Petitioner contends that the trial court erred in rejecting his offer of proof. But that offer was irrelevant to the issue of willfulness in the context of this case.

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[1] "R." refers to the record appendix filed in the court of appeals.

Willfulness, under the tax misdemeanor and felony statutes, consists of "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, No. 71-1698, decided May 29, 1973 (slip op.14). Although evidence of inability to pay might possibly be relevant to willfulness in cases where a defendant establishes that he had a good faith belief that he could not lawfully file without paying the tax (see *Yarborough* v. *United States*, 230 F. 2d 56 (C.A. 4), certiorari denied, 351 U.S. 969), petitioner made no such claim. To the contrary, petitioner conceded knowledge of a legal duty to file and admitted deliberately failing to file merely in order to avoid paying the tax.

Similarly, evidence of emotional distress engendered by marital difficulties might be relevant to a defense based upon inadvertence or negligence (see *United States* v. *Gorman*, 393 F. 2d 209 (C.A. 7), certiorari denied, 393 U.S. 832), but petitioner never relied upon or suggested such a defense at trial. In the absence of such a defense, evidence of emotional distress is irrelevant and may be excluded. *United States* v. *Haseltine*, 419 F. 2d 579 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.